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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re the Marriage of KERRI D. and  
MICHAEL J. MARTELLA.

KERRI D. MARTELLA,

Appellant,

v.

MICHAEL J. MARTELLA,

Respondent.

D068417

(Super. Ct. No. DN136432)

APPEAL from an order of the Superior Court of San Diego County, William Y. Wood, Commissioner. Affirmed.

Law Office of Rick Augustini and Rick Augustini for Appellant.

Procopio, Cory, Hargreaves & Savitch, Kendra J. Hall and David M. Zachry for Respondent.

Kerri D. Martella appeals a postjudgment order terminating her spousal support from her former husband, Michael J. Martella. Kerri contends: (1) the trial court's statement of decision was deficient because it did not address multiple issues that she had

raised, (2) substantial evidence did not support the trial court's finding that there had been a material change of circumstances, and (3) the trial court did not properly weigh the factors set forth in Family Code section 4320 to modify a spousal support order.<sup>1</sup> We reject Kerri's arguments and affirm the trial court's order.

## FACTUAL AND PROCEDURAL BACKGROUND

### *Marriage and Dissolution*

Kerri and Michael married in 1993. Michael owned and worked at MARCOA, a business he formed prior to their marriage. MARCOA publishes and provides relocation guides and maps to the majority of the United States military bases across the country. Prior to their marriage, Kerri worked as a respiratory therapist. She did not work after she married Michael.

Kerri and Michael separated in late 2004 or early 2005, after approximately 11 and a half years of marriage. Kerri petitioned for divorce in 2005. In 2008, the parties entered into a marital settlement agreement (MSA), which divided their assets. Under the MSA, Michael paid Kerri \$2,000,000 to equalize the division of property. Michael retained his interest in MARCOA as his separate property. The parties' MSA reserved jurisdiction over Kerri's right to spousal support.

In connection with Kerri's request for spousal support, the parties disputed Michael's income. In her income and expense declaration, Kerri stated that Michael's

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<sup>1</sup> Undesignated statutory references are to the Family Code.

income was at least \$85,000 per month, while Michael stated it was approximately \$61,000. Kerri claimed that her monthly expenses were \$20,185.

Effective August 2008, the parties stipulated that Michael would pay Kerri \$16,500 per month in permanent spousal support, subject to further court order. The spousal support was "based upon the facts and circumstances discovered during the litigation, the facts and circumstances that existed while this Agreement was being negotiated, the marital standard of living [of the] parties and the assets, liabilities and needs of the parties." In November 2008, the court incorporated the parties' stipulation into its supplemental judgment on the reserved issue of spousal support.

#### *Michael's Request to Modify or Terminate Spousal Support*

In March 2014, Michael filed a Request for Order seeking to modify or terminate his spousal support obligations, claiming he was 75 years old and planned to retire soon, which would decrease his income dramatically. Michael retired that month. Shortly thereafter, Michael sought to suspend the court's November 2008 support order. Michael asserted that MARCOA, which he relied upon to pay spousal support, was struggling financially and could not continue to pay him at the same level it had in the past.

#### *Michael's Finances*

Michael is the sole owner of MARCOA. He is also the sole owner of Black Mountain Properties (Black Mountain), a company that owns the building MARCOA leases and from which it operates its business. In 2013, prior to Michael's retirement, MARCOA paid him a salary of \$608,000 per year and some of his personal expenses. He had social security income in the amount of \$30,803.

Michael also had various sources of "pass-through" income.<sup>2</sup> For example, \$69,818 in rental income "passed-through" to him from Black Mountain and \$214,097 in ordinary income, \$56,568 in rental income, and \$24,112 in interest income "passed through" to him from MARCOA. Michael had not received any profit distributions from MARCOA since 2006. Further, he did not personally receive the "pass-through" income from MARCOA and Black Mountain reflected on his tax returns, meaning he did not receive cash money; instead, it was only attributed to him as taxable income on his tax returns.

Additionally, MARCOA loaned Michael money through shareholder advances. As of December 31, 2009, the balance on the shareholder loans was approximately \$1,800,000.

After he retired, MARCOA no longer paid Michael a salary, but continued to pay his personal expenses and provide him with shareholder advances. In July 2014, MARCOA's board of directors decided to eliminate Michael's shareholder advances; the board later reinstated the advances in the amount of \$7,750 per month starting in late 2014. Between January and October 2014, MARCOA loaned Michael over \$200,000.

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<sup>2</sup> " 'Pass-through' income refers to a small business corporation's income, deductions, losses, and credits that pass through to the shareholders of the corporation in accordance with each shareholder's pro rata share of ownership in the corporation, and is reported on each shareholder's individual federal income tax return under the Subchapter S Revision Act of 1982." (*Zold v. Zold* (Fla. 2005) 911 So.2d 1222, 1225, fn. 2, citing 26 U.S.C.A. § 1366 (West Supp. 2005).) "As with a partnership, corporate income is taxed to the shareholders whether or not distributed to them." (Friedman, Cal. Practice Guide: Corporations (The Rutter Group 2016) ¶ 126.1; *City of Los Angeles v. Furman Selz Capital Management, LLC* (2004) 121 Cal.App.4th 505, 513-514 [the same rules apply to limited liability companies].)

The balance of the shareholder loans had increased to approximately \$2.4 million.

Further, after retirement, Michael's pass through profits potentially increased because the company no longer had the expense of paying his salary. However, he did not receive profit distributions.

Under the term of the parties' MSA, Michael retained his two retirement accounts. In 2005, those accounts held approximately \$458,700. By the time of trial in this matter, Michael only had \$15,681 left in his retirement accounts because he had withdrawn the money in the past. For example, in 2011, Michael withdrew approximately \$210,000. Michael had also borrowed extensively from his life insurance policies that had a cash surrender value. Michael owed the Internal Revenue Service \$146,212 for unpaid 2013 personal income taxes, including penalties and interest.

#### *Kerri's Finances*

In 2002, Kerri suffered a brain injury when she fell from a horse. Her doctor testified that her brain injury had not improved since 2005 and there is no evidence that it will improve in the future. Kerri's injury impacted her memory, ability to plan, and emotional control. Kerri also suffered from headaches and seizures, and was diagnosed with epilepsy before she married Michael. Kerri's doctor opined that Kerri's impairments made her unemployable.

At the time of their divorce, Kerri estimated that her average monthly income was \$1,750. She acknowledged that she received income and distributions from various Texas entities in which she had an interest. At that time, she estimated that her monthly expenses were \$20,185.

At trial, Kerri estimated that her monthly expenses were \$27,677. In 2013, she had taxable income in the amount of \$530,507, which included \$198,000 from spousal support and a one-time distribution in the amount of \$364,000 from a Texas entity identified as North East Center Ltd. She continued to hold an interest in multiple Texas businesses.

#### *MARCOA's Financial Condition*

At trial, the parties disputed MARCOA's financial health. Matt Benedict, MARCOA's president and chief executive officer, testified that MARCOA's main product was military relocation guides that were supplied to military members upon their arrival at a new duty station. The advertising revenue generated within the publications made up 100 percent of MARCOA's revenue. According to Benedict, MARCOA's revenue was declining because the Department of Defense was not expanding military bases and was cutting its budget, MARCOA could not retain sales people, sales personnel productivity was declining, and the company had not successfully transitioned to the digital world.

Benedict testified that MARCOA was struggling financially and had insufficient cash flow to meet its liabilities. In order to address its cash flow problems, MARCOA eliminated some expenses. For example, MARCOA stopped paying Michael, did not replace executives that left the company, downsized operations, let go of employees, and delayed paying its taxes and vendors. MARCOA's net income had declined year after year between 2010 and 2013. In the past, Michael made capital contributions to

MARCOA so that the company could make payroll and pay vendors. For example, Michael put \$450,000 into the company in 2008, \$225,000 in 2009, and \$25,000 in 2010.

Kerri's counsel elicited testimony from Benedict that MARCOA had experienced cash flow problems since at least 2007. Further, the company's net income was better in 2014 than it was in 2008 when the court made the original support order. Kerri's counsel also questioned Benedict about MARCOA's lease of a building from Black Mountain and suggested that the two companies reduced MARCOA's rent as a means to decrease Michael's income. Specifically, in 2013, Black Mountain reduced MARCOA's rent from \$600,000 to \$490,000 per year, and reduced the rent again in October 2014 to \$360,000 per year. As a result, Black Mountain received less money, which decreased Michael's income.

Benedict explained that MARCOA and Black Mountain entered into the new lease because Black Mountain refinanced the property, reducing its mortgage payment from \$40,000 to \$27,500 per month. Thus, the companies renegotiated the lease to \$30,000 per month. The money Black Mountain received in excess of its mortgage payment was used to pay down Michael's shareholder loan.

#### *Trial Court's Decision*

After hearing the evidence, the court took the matter under submission and each party requested a statement of decision. In April 2015, the court notified the parties of its proposed statement of decision. Kerri objected to the proposed statement of decision on grounds that (1) the court did not identify a legitimate factual basis for finding a change in circumstances, (2) the court's findings regarding the marital standard of living and

Michael's earning capacity were erroneous, and (3) the court's conclusions about Kerri's earning capacity, Michael's health, Kerri's alleged mismanagement of her money, Michael's income, assets, and ability to pay spousal support, and Kerri's income, assets, and needs were ambiguous. The court overruled Kerri's objections and issued its final statement of decision.

In its final statement of decision, the court concluded that there had been a material change in circumstances such that it was appropriate to modify Michael's spousal support obligation. The court based its decision on Michael's retirement, the declining financial health of MARCOA, and Michael's health and age. The court noted that in the past Michael had put significant sums of money into MARCOA to make payroll and pay vendors. Further, he had consistently taken money out of the business through shareholder advances, which had harmed its financial health. The court rejected Kerri's argument that MARCOA was doing better than it was in 2008. Instead, the court determined that MARCOA's growth had declined and that the decline was a trend rather than an aberration.

After concluding that Michael had shown a material change in circumstances, the court considered the factors set forth in section 4320. It concluded that the earning capacity of both parties was insufficient to maintain the standard of living established during their marriage. The court detailed the parties' assets and liabilities. It stated that MARCOA was difficult to value because it occupied a niche in a declining sector of the economy, struggled to refinance lines of credit, has been unable to obtain new credit, and did not attract offers when placed on the market for sale. Michael was dependent on

shareholder advances to support his lifestyle, but the income available to him for support rested upon the questionable continuing ability of MARCOA to provide him advances. The court also concluded that although Kerri could not work as a result of her injury, she had significant assets and should employ a professional fiduciary to manage her finances according to her own actuarial timeline. Further, the court determined that Kerri had mismanaged her financial circumstances and provided an inadequate explanation for her claim of \$7,000 per month in uninsured medical expenses.

Ultimately, the court entered a step-down spousal support order requiring Michael to pay \$8,500 per month for one year and \$4,250 per month for six months. Thereafter, Michael no longer had to pay Kerri any spousal support.

## DISCUSSION

### *I. Statement of Decision*

Kerri argues that the trial court's statement of decision was deficient because it did not adequately address issues raised in her objections. Specifically, she contends the court erred by not addressing 15 issues: (1) the factual basis for the court's conclusion that Michael's ability to pay spousal support has materially changed since the 2008 support order, (2) evidence that MARCOA is doing better now than in 2008, (3) Michael's failure to produce evidence regarding his income or the financial condition of his businesses in 2008, (4) evidence that Michael has not been involved in day-to-day management of MARCOA since 1996 and that Benedict has been running the company since 2007, (5) evidence that Michael and Benedict disagreed regarding the value of MARCOA and its ability to make shareholder advances, (6) evidence that MARCOA is

not the sole source of Michael's wealth, (7) the court's conclusions about MARCOA's financial statements are ambiguous, (8) the court's conclusions about the impact of Michael's health on MARCOA are ambiguous, (9) the court's conclusions about MARCOA's growth were ambiguous because the court failed to mention the company's profitability and relied on financials from before the 2008 support order, (10) the court's conclusion that the decline in MARCOA's business was a trend was ambiguous and based on facts that pre-date the 2008 support order, (11) the court's findings regarding the marital standard of living and Michael's earning capacity were erroneous and ambiguous, (12) the court's conclusion regarding Michael's health were ambiguous and not supported by the evidence, (13) the court's conclusion that Kerri mismanaged her finances was ambiguous and erroneous, (14) the court's conclusions about Michael's income, assets, and ability to pay spousal support were ambiguous and erroneous, and (15) the court's conclusions about Kerri's income, assets, and needs are ambiguous and erroneous.

A statement of decision must explain the factual and legal basis for the court's decision regarding the principal controverted issues at trial (*In re Cheryl E.* (1984) 161 Cal.App.3d 587, 599); it does not need to specify the particular evidence considered by the trial court in reaching its decision (*Muzquiz v. City of Emeryville* (2000) 79 Cal.App.4th 1106, 1125). Additionally, a statement of decision need only state ultimate rather than evidentiary facts "because findings of ultimate facts necessarily include findings on all intermediate evidentiary facts necessary to sustain them." (*In re Cheryl E.*, at p. 599.) "Only where a trial court fails to make findings as to a material issue which would fairly disclose the determination by the trial court would reversible error

result." (*Nunes Turfgrass, Inc. v. Vaughan-Jacklin Seed Co.* (1988) 200 Cal.App.3d 1518, 1525.) "Even then, if the judgment is otherwise supported, the omission to make such findings is harmless error unless the evidence is sufficient to sustain a finding in the complaining party's favor which would have the effect of countervailing or destroying other findings." (*Hellman v. La Cumbre Golf & Country Club* (1992) 6 Cal.App.4th 1224, 1230.)

Kerri is not complaining about omitted findings on principal controverted issues at trial; rather, she is complaining that the trial court erred in its findings and failed to address certain evidence. Here, the family court's statement of decision disposed of the core issue, namely whether there had been a change in circumstances since the last support order warranting a modification. In reaching its conclusion, the court went through a detailed analysis of the section 4320 factors, considered both parties' arguments, and set forth the evidence supporting its decision. The court was not required to address all evidentiary facts or accept Kerri's evidence as determinative on a particular issue. Instead, a statement of decision requires no more than to fairly disclose "determinations as to the ultimate facts and material issues in the case." (*Central Valley General Hospital v. Smith* (2008) 162 Cal.App.4th 501, 513.) Where, as here, the family court's statement of decision addressed the ultimate facts and material issues, we have no basis to conclude the statement of decision was insufficient and reject Kerri's claim of error.

## II. *Material Change in Circumstances*

## A. General Legal Principles

" 'Modification of spousal support, even if the prior amount is established by agreement, requires a material change of circumstances since the last order. [Citations.] Change of circumstances means a reduction or increase in the supporting spouse's ability to pay and/or an increase or decrease in the supported spouse's needs. [Citations.] It includes all factors affecting need and the ability to pay.' [Citation.]" (*In re Marriage of Dietz* (2009) 176 Cal.App.4th 387, 396 (*Dietz*).)

The trial court has broad discretion in ruling on a request to modify or terminate a spousal support order. (*In re Marriage of Biderman* (1992) 5 Cal.App.4th 409, 412.) We review an order granting or denying a request to modify spousal support for an abuse of discretion, which is established only when " 'it can fairly be said that no judge would reasonably make the same order under the same circumstances.' " (*In re Marriage of Reynolds* (1998) 63 Cal.App.4th 1373, 1377, quoting *In re Marriage of Sinks* (1988) 204 Cal.App.3d 586, 591.) Moreover, we may not disturb a trial court's factual findings if there is substantial evidence to support them. (*In re Marriage of Norvall* (1987) 192 Cal.App.3d 1047, 1060.) "In reviewing findings supporting a trial court's exercise of discretion in modifying spousal support, we accept as true all evidence supporting the trial judge's findings, resolve all conflicts in the evidence in favor of the prevailing party and indulge in all legitimate and reasonable inferences to uphold the judgment." (*In re Marriage of Rising* (1999) 76 Cal.App.4th 472, 474, fn. 2 (*Rising*).)

## B. Change of Circumstances

Kerri makes a series of arguments challenging the family court's conclusion that there had been a material change in circumstances impacting Michael's ability to pay since the last support order. She contends the family court's conclusion was erroneous because: (1) Michael did not produce his 2008 tax return, (2) MARCOA's financial statements indicated it was doing better than it was in 2008 when the court entered the prior support order, (3) Michael's retirement did not constitute a change in circumstances because he had not been actively involved in operations of the company for years, (4) MARCOA was not experiencing financial problems and, to the extent MARCOA was experiencing cash flow problems, the same was true in 2008, (5) Michael and Benedict had disagreed about the value of MARCOA and its ability to make shareholder advances since 2006, and (6) nothing had changed since the 2008 support order which would justify a reduction or termination of spousal support. We reject these arguments.

### 1. Michael's 2008 Tax Return

Kerri contends Michael did not meet his burden to show a change in circumstances since the prior support order because he did not produce his 2008 tax return. Specifically, she argues that Michael's failure to introduce his tax return prevented the court from determining whether his income had changed since 2008. She relies on Evidence Code sections 412 and 413, arguing that the court should have viewed any evidence that Michael offered about his 2008 income with distrust and drawn adverse inferences from his failure to introduce his tax return.

Evidence Code section 412 provides that "[i]f weaker and less satisfactory evidence is offered when it was within the power of the party to produce stronger and more satisfactory evidence, the evidence offered should be viewed with distrust."

Evidence Code section 413 allows the trier of fact to draw adverse inferences from the evidence or facts in a case based on a party's suppression of evidence.

The weight of any inferences to be drawn under Evidence Code sections 412 and 413 are matters for the trial court and are only of concern to us when there is no substantial evidence to support a judgment. (*Moore v. Spremo* (1945) 72 Cal.App.2d 324, 328-329.) As we explain, *post*, there is substantial evidence to support the family court's order. Thus, we reject Kerri's argument that Evidence Code sections 412 and 413 require reversal of the family court's order.

Moreover, the family court had evidence before it from which it could determine the circumstances existing at the time of the 2008 support order. In particular, shortly before the parties stipulated to the amount of Kerri's spousal support, she had submitted an income and expense declaration in which she stated that Michael's income was \$85,000 per month. Kerri estimated Michael's income based on the amount of money that they made during their marriage. Kerri's statement in her income and expense declaration, made under penalty of perjury, was the only evidence before the court concerning Michael's income at the time of the 2008 support order. Although Kerri attempted to minimize the evidence by stating that she "guesstimated" the amount, the weight of the evidence was a matter for the trial court to determine and we will not

reweigh the evidence on appeal. (*McClellan v. McClellan* (1958) 159 Cal.App.2d 225, 227.)

## 2. MARCOA's Financial Statements

Kerri argues that the trial court erred in finding there was a material change in circumstances warranting termination of her spousal support because MARCOA's financial statements indicated that it was doing better than it was in 2008 when the court entered the prior support order. Kerri relies on evidence that showed MARCOA's "net income" for the first 10 months of 2014 was better than it was during the first 10 months of 2008. The family court considered this evidence and rejected Kerri's interpretation of it. Instead, the family court determined that MARCOA was not as financially healthy as it was in 2008. The family court's finding was supported by substantial evidence.

Benedict explained that the financial statements Kerri relies upon were not an accurate indicator of MARCOA's financial health. Specifically, MARCOA's financial statements were prepared using generally accepted accounting practices. Under those principles, MARCOA's financial statements show "published revenue" figures.

"Published revenue" reflects what the company has shipped in finished good product and is a "lagging indicator of what's happening in the field." "Processed revenue," on the other hand, "refers to receipts in the field. . . . [I]t's real time contracts and cash coming in from the field." Benedict testified that he relies on "processed revenue" to assess MARCOA's financial health. MARCOA's "processed revenue" for the last quarter of 2014 indicated that there was "continued pressure on cash flow within the organization, and it will manifest itself in the first and second quarter financials in 2015. Thus, even

though MARCOA's financial statements reflect periods when its income was up, the documents do not show "what's happening [in] real time in the business." MARCOA does not generate financial statements showing "processed revenue" figures.<sup>3</sup>

Moreover, Benedict explained that although MARCOA's financial statements show net income of \$640,378 as of November 30, 2014, that figure was only that high because MARCOA had eliminated substantial costs and did not pay certain bills in 2014. For example, MARCOA eliminated Michael's salary, did not pay its taxes on time, reduced its rent, and did not replace lost or fired employees. If the company had not reduced those costs, its net income would have been much lower.

Kerri's argument essentially asks us to reweigh the evidence and disregard Benedict's testimony explaining MARCOA's financial statements. We will not do so. (See *Rising*, *supra*, 76 Cal.App.4th at p. 474, fn. 2.) The family court's conclusion that MARCOA was not as financially healthy as it was in 2008 was supported by substantial evidence. We uphold the trial court's factual determination " 'as long as [it] is within the range of the evidence presented' " (*In re Marriage of Blazer* (2009) 176 Cal.App.4th 1438, 1443 (*Blazer*)) and we draw all inferences in favor of the court's decision (*In re Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 1133).

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<sup>3</sup> Kerri contends that the court should disregard or view with distrust Benedict's testimony regarding MARCOA's "processed revenue" because Michael did not produce documents showing that information. Benedict testified that MARCOA did not produce financial information showing "processed revenue" because Kerri did not ask for it. Kerri's document requests are not in the record and that dispute is not before this Court. Further, we see nothing in the record indicating that Michael chose to offer "weaker and less satisfactory evidence . . . when it was within [his] power . . . to produce stronger and more satisfactory evidence." (Evid. Code, § 412.)

MARCOA's net income had declined year after year between 2010 and 2013. Further, Benedict testified that MARCOA was experiencing cash flow problems and he did not feel comfortable distributing any of MARCOA's cash to Michael. MARCOA's revenue was declining because the Department of Defense was not expanding military bases and was cutting its budget, MARCOA's sales productivity was down, and the company, which was dependent upon advertisement revenue, had not successfully transitioned to the digital world. MARCOA downsized operations and struggled to pay its taxes and its vendors. In 2014, based on MARCOA's financial status and to maintain the viability of the company, its board of directors recommended to Martella that he cease all shareholder advances beyond the amount needed to cover his spousal support obligations. In contrast, in 2008, Kerri estimated that Michael's income was \$85,000 per month, presumably largely from MARCOA, and stated that he continued to borrow significant amounts from the company. Based on the foregoing evidence and the reasonable inferences drawn therefrom, there was substantial evidence to support the family court's finding that MARCOA was not as healthy in 2014 as it was in 2008.

### 3. Michael's Retirement

Kerri argues Michael's retirement did not constitute a change in circumstances because he had not been involved in MARCOA's operations since 2007, he merely traded his salary for greater back end distributions, and to the extent he stopped receiving distributions, he made the money disappear. We reject these arguments.

Retirement can constitute a material change in circumstances to justify a modification of spousal support. (*In re Marriage of Reynolds, supra*, 63 Cal.App.4th at

p. 1378.) Just as "a supporting spouse cannot retire prematurely in order to avoid paying spousal support," "a supporting spouse should not be forced to continue working" after an age-appropriate retirement date. (*Id.* at p. 1379.)

Here, Michael retired at the age of 75. He suffered from health problems, including coronary artery disease and memory issues. Upon his retirement, Michael stopped receiving his salary of \$608,000; instead, MARCOA continued to pay his personal expenses and provide him with shareholder advances. In 2014, MARCOA loaned Michael over \$200,000.

Kerri contends Michael's retirement did not constitute a change in circumstances because Benedict testified that Michael had not worked regularly at MARCOA since 2007. Instead, Benedict ran the company. By July 2013, Benedict valued Michael's contribution to MARCOA as zero. While Michael had not been significantly involved in MARCOA's operations, this did not preclude the trial court from finding his retirement was a change in circumstances. After Michael retired in March 2014, MARCOA no longer paid him a salary. Whether or not Michael actively participated in MARCOA's operations, the elimination of Michael's salary was a significant change in circumstances. According to Benedict, MARCOA should have reduced Michael's salary years ago. Thus, Kerri benefited from Michael's continued receipt of a salary despite his limited work contribution to MARCOA.

Further, although Michael's "pass through" profits would potentially increase because MARCOA no longer paid him a salary, he had not actually received profit distributions. "The spousal support statute does not define income. "There are no statutes

that address the computation of income for the purpose of determining spousal support.' " (*Blazer, supra*, 176 Cal.App.4th at p. 1445.) However, guidance is provided by case law. In *Blazer*, the supporting husband had one source of income, a limited liability company, which was undercapitalized. (*Id.* at p. 1444.) Certain monies were not actually taken by the supporting husband as income but were instead reinvested as capital contributions in order to ensure continued survival of the company. (*Id.* at pp. 1444-1445, 1447.) The *Blazer* court held that the "trial court acted within its discretion in attributing the reinvested funds to the business instead of husband." (*Id.* at p. 1448.) As in *Blazer*, MARCOA was undercapitalized and Michael did not receive profit distributions from the company. Similarly, Michael did not receive profit distributions from Black Mountain. Thus, the trial court acted within its broad discretion by not including "pass through" profits as part of Michael's income.

#### 4. MARCOA's Financial Problems

Kerri argues there was no material change in circumstances because MARCOA was not experiencing financial problems and, to the extent MARCOA was experiencing cash flow problems, the same was true in 2008. Kerri relies on Benedict's testimony that he expected MARCOA would be doing better financially in the next year and MARCOA had experienced cash flow problems since 2006. We reject Kerri's argument.

The testimony Kerri points to does not suggest that circumstances have not changed. Based on the totality of the evidence, it appears MARCOA had long experienced cash flow problems and its financial circumstances are progressively getting worse. Benedict's testimony about MARCOA's longstanding financial problems was

consistent with the company's financial statements, which show its net income had declined year after year between 2010 and 2013. Benedict also testified that MARCOA was currently struggling financially and had insufficient cash flow to meet its liabilities. Between 2008 and 2010, Michael had made significant capital contributions to MARCOA so that the company could make payroll and pay its vendors. However, he did not continue to make capital contributions to the company. Further, while the company had provided Michael with large shareholder advances in the past, in 2014, its board of directors recommended curtailing those advances "given the current financial status of the company and in order to maintain the viability of the company." This evidence supports the trial court's conclusion that MARCOA was not as healthy as it was in 2008. (*Rising, supra*, 76 Cal.App.4th at p. 474, fn. 2 [we accept as true all evidence supporting the trial court's conclusion and indulge all reasonable inferences to support the court's order].)

#### 5. Michael's Shareholder Advances

Kerri contends that the trial court erred in basing its conclusion of a change in circumstances on an alleged disagreement between Michael and Benedict regarding the value of MARCOA and its ability to keep making shareholder loans because the same facts existed in 2006. We reject this argument.

Benedict testified that Michael valued MARCOA at around \$12 million whereas Benedict thought it was worth only \$5.5 million. Benedict had explained to Michael that the \$12 million valuation, which was based on a calculation of one times revenue, was not the proper standard to value a company like MARCOA. Further, according to

Benedict, Michael did not have an understanding of the severity of MARCOA's financial situation.

Based on our review of the family court's statement of decision, its decision did not hinge on the disagreement between Benedict and Michael regarding the value of MARCOA and its financial strain. Instead, the court mentioned those facts when discussing Michael's retirement at the age of 75 and his decreased involvement in and knowledge of the company. The court concluded that there had been a change in circumstances due to MARCOA's declining financial health, Michael's age, and his retirement. As we previously explained, those findings were supported by substantial evidence.

Kerri also faults the trial court's order because it "appears to have confused income and shareholder advances." In its statement of decision, the trial court stated: "[Michael] has also consistently taken money out of the business in the form of shareholder advances and loans. In the tax year 2011, [Michael] received \$1,273,000.00. In 2012 he received \$1,052,709.00. In 2013 he received \$877,122.00. [Michael] argues that his 2014 income is comprised of \$2,263.00 per month in social security, \$50,666.00 in salary prior to his retirement in March 2014, and 'shareholder loans/advances from MARCOA since retirement.' The court is persuasively informed that MARCOA's financial health has been harmed by those withdrawals." As Kerri points out, the figures the court referenced as to what Michael "received" in 2011 through 2013 were his income, not his shareholder advances. Whether the court was referencing Michael's shareholder advances or income, the family court did not abuse its discretion in finding a change in circumstances because

Michael's financial circumstances changed after retirement. The evidence established that upon his retirement, Michael no longer received a salary and in 2014, his shareholder advances decreased.

Lastly, Kerri contends that Michael has no intention of repaying the loans and they were simply a way to get tax-free cash to Michael. Resolving all conflicts in favor of Michael, as we must, Kerri's argument is contradicted by the evidence. (See *Rising*, *supra*, 76 Cal.App.4th at p. 474, fn. 2.) While Michael testified in his deposition that he did not intend to repay the shareholder advances, he clarified at trial that he "[has] to do whatever the law says [he has] to do" and "[he has] people that will resolve that issue as the cash flow indicates that we can do it." Further, Michael used the money that Black Mountain received in excess of its mortgage payment to pay down his shareholder loans. Regardless, whether Michael intended to repay the shareholder advances does not change that his income and shareholder advances declined after his retirement.

#### 6. Change in Circumstances Since Last Order

Kerri argues nothing had changed since the 2008 support order which would justify a reduction or termination of spousal support. Specifically, she contends that the following facts were true at the time of the original support order and remain true now: Michael owns 100 percent of MARCOA and Black Mountain, Black Mountain owns an office building, Michael is almost entirely dependent on MARCOA to finance his lifestyle, Michael borrows significant amounts from MARCOA, MARCOA is suffering cash flow problems, Kerri had received a \$2,000,000 equalization payment, Kerri suffered health issues, and Kerri had undergone multiple treatments for her seizure and

memory issues. This argument ignores the trial court's conclusion that MARCOA's financial health was deteriorating, Michael's income had decreased, and he had retired at the age of 75. As we explained, the trial court's factual findings were supported by substantial evidence. We find no abuse of discretion in the trial court's conclusion that MARCOA's financial situation and Michael's age and retirement constitute a material change in circumstances.

### III. *Section 4320 Factors*

#### A. General Legal Principles

" 'A trial court considering whether to modify a spousal support order considers the same criteria set forth in . . . section 4320 as it considered in making the initial order.' " (*Dietz, supra*, 176 Cal.App.4th at p. 396.) The section 4320 criteria include the extent to which each party's earning capacity is sufficient to maintain the marital standard of living, contributions to the supporting spouse's education, training, or career, the supporting party's ability to pay spousal support, the parties' respective needs based on the marital standard of living, obligations and assets including their separate property, their ages and health, the tax consequences to each party, the duration of the marriage, the supported spouse's ability to engage in gainful employment, the "balance of the hardships" to the parties, the goal that the supported party shall be self-supporting within a reasonable period of time, a criminal conviction of an abusive spouse, and "[a]ny other factors the court determines are just and equitable." (§ 4320, subds. (a)–(n).)

#### B. Analysis

Kerri argues the family court committed reversible error in connection with its analysis of the section 4320 factors. Specifically, she argues: (1) the family court erred in concluding that she mismanaged her assets and was required to use her share of the community property to support herself, (2) the family court's conclusions about Michael's income, assets and ability to pay spousal support are erroneous as a matter of law, and (3) the family court's conclusions regarding her income, assets and needs are ambiguous and erroneous. We reject these arguments.

#### 1. Use of Community Property as Support and Mismanagement of Estate

"[I]f a court's initial spousal support award contemplates that a supported spouse will take some action to decrease the need for spousal support following the issuance of the order and the supported spouse fails to take that action, the court may modify the award on the ground of changed circumstances." (*In re Marriage of Shaughnessy* (2006) 139 Cal.App.4th 1225, 1238.) Further, a supported spouse's improvident management of assets may justify termination of spousal support. (*In re Marriage of McElwee* (1988) 197 Cal.App.3d 902, 909-910 (*McElwee*).) As the *McElwee* court noted, "just as lack of diligence in seeking employment may lead to a refusal to award spousal support [citation], so too may improvident management of assets, which were sufficient to provide self-sufficiency in the accustomed lifestyle, justify termination of support and jurisdiction even though such an order may result in an alteration in the supported spouse's lifestyle. To hold otherwise, would encourage profligacy and discourage sound investment and prudent management to the detriment of all concerned." (*Ibid.*; but see *In re Marriage of West* (2007) 152 Cal.App.4th 240, 250-251 (*West*) [trial court erred in

reducing spousal support on the ground that supported spouse failed to invest cash asset from the sale of a community business where there was no evidence that supported spouse used the principal for anything other than unexpected expenses pertaining to the parties' son and to maintain her marital standard of living and supported spouse did not receive warning that she was expected to invest the principal].)

Here, the parties separated in 2004 or 2005. Kerri received a \$2 million equalization payment when the parties divorced. Between August 2008 and August 2014, Kerri also received approximately \$1.2 million in spousal support from Michael. In 2013, she received \$364,000 from a Texas investment. Upon the parties' divorce, Kerri planned to live off of the interest on her \$2 million equalization payment plus spousal support. However, she used a substantial portion of the principal of her equalization payment to pay expenses, including significant out-of-pocket medical expenses, paying off a lien, attorney's fees, paying off her vehicle, and buying furniture for her home. By December 2014, Kerri had \$707,432 in liquid assets. Since 2008, Kerri had not employed a financial planner to help her manage her finances. Kerri's neuropsychologist strongly urged that Kerri's "finances and other major business and monetary decision making should be serviced by a professional fiduciary." The neuropsychologist testified that a personal fiduciary would have been appropriate since the time of her brain injury in 2002.

Citing to *West, supra*, 152 Cal.App.4th 240, Kerri contends that the trial court erred in finding that she was required to use her share of the community property to support herself. Contrary to her argument, the family court did not make that finding.

Instead, the family court found that there was "serious mismanagement associated with [Kerri's] financial circumstances." In making that finding, the court noted that Kerri's neuropsychologist testified that she should have a professional fiduciary to manage her finances, Kerri had not utilized a professional fiduciary, she received \$2 million in 2008 as an equalization payment, she received an additional \$1.2 million in spousal support between August 2008 and August 2014, and she received money from her Texas investments. The court went on to note that Kerri spent more than \$2,150,000 between August 2008 and August 2014, failed to make any plans for the \$4 million she received from Michael since 2005 and as of December 2014, she only had \$707,432 in cash and liquid assets. Lastly, the court noted that it did not receive an adequate explanation for Kerri's expenditures of \$7,000 per month on uninsured monthly medical expenses and "view[ed] the alleged expenses with significant skepticism."

Kerri's reliance on *West, supra*, 152 Cal.App.4th 240 is misplaced. In that case, the wife received funds from the sale of a community business. (*Id.* at p. 250.) The trial court had noted that it was puzzled by how the wife "ha[d] been unable to accumulate any savings from the significant funds that she received from the sale of the community business. Had [the wife] made prudent use of those funds, the Court strongly believe[d] that she would be enjoying a lifestyle much closer to that of the marital standard of living." (*Id.* at p. 245.) The Court of Appeal found that the wife's receipt of "a substantial cash asset upon termination of the marriage provides no grounds for later reducing support, and even if it did, it would be an abuse of discretion to penalize her for failing to invest that asset without providing her with fair warning" "that she would be

expected to invest [the principal]." (*Id.* at pp. 250-251.) In contrast, in *McElwee, supra*, 197 Cal.App.3d at p. 910, the court found that similar to a lack of diligence in seeking employment, a supported spouse's failure to manage her finances in a manner that allows her to become self-supporting can justify termination of support.

Unlike the supported spouse in *West*, Kerri received warnings when she entered into the MSA that she "should make reasonable efforts to assist in providing for . . . her own support needs" and that the goal under section 4320, subdivision (k), was that she should be self-supporting within a reasonable period of time. She received those warnings again when she stipulated to entry of a supplemental judgment on the issue of spousal support. Kerri could not work as a result of her 2002 injury. Thus, she had to rely on prudent management of her assets and income to assist in providing for her own support needs and to become self-supporting. (See *McElwee, supra*, 197 Cal.App.3d at p. 910.) As in this case, " 'if a court's initial spousal support award contemplates that a supported spouse will take some action to decrease the need for spousal support following the issuance of the order and the supported spouse fails to take that action, the court may modify the award on the ground of changed circumstances.' " (*West, supra*, 152 Cal.App.4th at p. 247.) Thus, the trial court did not abuse its discretion by considering Kerri's asset and income management.

The trial court's finding that Kerri mismanaged her assets is supported by substantial evidence. Although her neuropsychologist thought that it would have been reasonable for Kerri to have a professional fiduciary to manage her finances and monetary decision-making, Kerri had not hired any type of financial planner. Instead,

she merely talked to Michael about budgeting issues and received some advice from family members. There is nothing in the record suggesting that Kerri's health or any other concern prevented her from hiring a fiduciary or someone to help her with financial planning. There is also nothing in the record indicating that Kerri had a plan for assisting in providing with her support needs or becoming self-supporting.

In her income and expense declaration, Kerri stated that her monthly expenses were \$27,677 per month, which included \$7,000 in uninsured medical expenses, \$1,917 on a life insurance policy on Michael, \$1,200 for physical therapy, \$1,000 for a housekeeper and personal assistant, \$350 for a driver and handyman, \$1,372 for expenses related to a horse, \$652 in pet care, \$3,700 in monthly taxes, and various other expenses. Between 2012 and 2014, she spent more than \$200,000 on unreimbursed out-of-pocket medical expenses. MARCOA paid her health insurance, at a cost of \$1,100 per month. It is unclear whether Kerri's \$7,000 monthly healthcare costs relate to her brain injury or some other concern. There is at least some evidence in the record that Kerri had elective procedures such as plastic surgeries and sought treatment for sleeping problems.

Kerri does not dispute the trial court's finding that between August 2008 and August 2014, she spent more than \$2,150,000, or approximately \$30,000 per month. Partly as a result of her expenditures, by December 2014, Kerri had depleted her liquid assets to \$707,432. Kerri had not invested or managed her money in a manner that would assist in providing for her support needs even though she received a warning that she was expected to do so. Based on the record, there is substantial evidence to support a finding that Kerri mismanaged her finances.

## 2. Family Court's Findings on Michael's Ability to Pay Spousal Support

Kerri argues that the family court's conclusions regarding Michael's income, assets, and ability to pay spousal support were erroneous as a matter of law. We reject her arguments.

First, Kerri faults the family court for failing to value MARCOA and Black Mountain. Kerri contends that the family court improperly failed to value Black Mountain because the bank valued it at \$5.6 million and it had a loan balance of \$4.76 million, meaning Michael had equity in the amount of \$840,000. We reject Kerri's argument because the trial court did place a value on the company, stating that it has equity between \$400,000 and \$1,000,000.

In regard to MARCOA, the family court concluded that the company was difficult to value because it "occupies a niche in a declining sector of the economy (print directory business), struggles to refinance lines of credit, has been unable to obtain a new line of credit, and has attracted no offers when placed on the market for sale." Kerri does not challenge these conclusions. Instead, she suggests that the family court should have assigned a monetary value to MARCOA because Benedict valued it at \$5.5 million and Michael valued it at \$12 million. She does not cite any authority for her proposition that the trial court was required to set forth a value for Michael's business. In any event, although the trial court did not place a specific value on MARCOA, we find no abuse of discretion because the family court attributed the asset to Michael and considered the important issue of the income that Michael could derive from the company. (*In re Marriage of Reynolds, supra*, 63 Cal.App.4th at p. 1380 ["Only investment income, not

investment principal, should be available to pay spousal support [citation], especially in this case where the subject retirement assets represent Husband's residual share of the community property awarded to him as part of the dissolution."].)

Second, Kerri argues the family court failed to address that Michael made his money "disappear" by entering into a "sweetheart" lease between MARCOA and Black Mountain and used rental income to pay down his shareholder loan. We reject this argument because the trial court clearly considered the lease between MARCOA and Black Mountain and its impact on Michael's shareholder advances. While the court did not refer to the lease between MARCOA and Black Mountain as a "sweetheart" deal designed to make Michael's money "disappear," the court explicitly noted that MARCOA's monthly rent decreased from \$40,000 to \$30,000 in conjunction with Black Mountain's mortgage refinance. The court went on to explain that "[t]he difference between rent paid by MARCOA and the mortgage payment made by [Black Mountain] is returned to MARCOA to reduce [Michael's] shareholder loan balance." We find no abuse of discretion in the trial court's consideration of the lease and payments on Michael's shareholder loans.

Third, Kerri contends the trial court's findings that Michael's post-judgment draws from MARCOA are shareholder loans, that Michael had been dependent on borrowing money from MARCOA, and that Michael had been taking equity out of the business were erroneous. On the issue Michael taking "equity" out of MARCOA, Kerri cites to the family court's *proposed* statement of decision, which stated "[Michael's] income available for support rests upon his questionable continuing ability to take *equity* out of

the company for his own benefit." In the family court's final statement of decision, it changed the term "equity" to "shareholder loans/advances." The trial court is not bound by its intended or proposed statement of decision; rather, it can modify a proposed decision and its final statement of decision constitutes its findings of fact and conclusions of law. (*Raville v. Singh* (1994) 25 Cal.App.4th 1127, 1131-1132.)

The family court's findings that Michael's post-judgment draws from MARCOA were shareholder loans and that he was dependent on borrowing significant sums of money from MARCOA to finance his lifestyle were supported by substantial evidence. Although, as Kerri points out, Michael received a salary of \$608,000 per year, he stopped receiving that salary upon his retirement. He did, however, continue to receive shareholder loans. In 2014, MARCOA had loaned Michael over \$200,000. Those loans included the amounts the board of directors authorized to partially cover Michael's household expenses. Between 2008 and late 2014, the loan balance had increased by approximately \$600,000. Michael was paying back the loans through Black Mountain and testified that he would pay back the loans as cash flow allowed (see part II.B.5). Based on the foregoing evidence, there was substantial evidence to support the trial court's finding that Michael's post-judgment draws from MARCOA were shareholder loans and that he was dependent on those loans to support his lifestyle.

Lastly, Kerri argues that the trial court's finding that "[Michael's] demeanor on the stand and his testimony validates the suggestion that [Michael's] age and health present challenges to the executive management team of MARCOA" was not supported by the evidence. Specifically, she faults the finding because no medical testimony was offered

regarding Michael's health. No medical testimony was required. (See *In re Scott* (2003) 29 Cal.4th 783, 823 ["The *fact finder* determines the facts, not the experts. Indeed, the fact finder may reject even 'a unanimity of expert opinion.' "].) Michael testified that he suffered from health problems, including coronary artery disease and memory issues. Unlike this Court, the family court was able to assess Michael's demeanor and credibility. "[A]ppellate courts should . . . defer to the fact finder's assessment of a witness's credibility because the fact finder was able to observe the witness's demeanor." (*Harustak v. Wilkins* (2000) 84 Cal.App.4th 208, 213.) We will not disturb the trial court's finding based on the credibility and demeanor of witnesses.

### 3. Family Court's Findings Regarding Kerri's Needs

Relying on *In re Marriage of Heistermann* (1991) 234 Cal.App.3d 1195 (*Heistermann*), Kerri contends that the court committed reversible error in terminating her spousal support because Michael did not prove that she was self-sufficient. Kerri's reliance on *Heistermann* is misplaced.

In *Heistermann*, the wife had been awarded spousal support following a marriage of eight years, eleven months. (*Heistermann, supra*, 234 Cal.App.3d at p. 1197.) The husband later moved to modify the award, asserting changed circumstances. (*Ibid.*) In part, the husband contended the wife was living with another man, had been working, and no longer required psychological therapy. (*Heistermann, supra*, 234 Cal.App.3d at pp. 1197-1198.) The trial court concluded the " 'burden of support [of the wife] should shift from [the husband] to society.' " (*Id.* at pp. 1198-1199.) It terminated wife's spousal support. (*Id.* at p. 1199.)

On appeal, the wife in *Heistermann* argued that the trial court abused its discretion in terminating support because the evidence established that she would be unable to support herself. (*Heistermann, supra*, 234 Cal.App.3d at p. 1199.) This Court agreed, holding:

"The record shows the trial court's decision to terminate support was not based on any finding of changed circumstances since the original decree, but was predicated on its policy conclusion that no spouse of a dissolved medium-length marriage should be required to indefinitely support a disabled ex-spouse. That is, the trial court assumed that after passage of a reasonable time spousal support for a disabled ex-spouse should be cut off irrespective of whether there has been a change of circumstances, and that needed future support should be borne by available social welfare programs or by other third party sources." (*Heistermann*, at p. 1200.)

In *Heistermann*, the original support order did not direct the wife to become self-supporting. (*Id.* at p. 1204.) In sum, this Court concluded that the trial court had erroneously concluded "that the mere passage of time required it to shift the support obligation from the ex-spouse to society and to terminate its jurisdiction over spousal support." (*Ibid.*)

Here, unlike *Heistermann*, the trial court did not terminate spousal support solely based on the mere passage of time or a policy consideration to shift the support obligation to society. Rather, the trial court considered the applicable statutory factors and balanced the equities involved. Further, in this case, the support order directed Kerri to make reasonable efforts to provide for her own support needs and warned her that she should become self-supporting within a reasonable period of time. These circumstances make *Heistermann* inapposite.

This Court's decision in *In re Marriage of Wilson* (1988) 201 Cal.App.3d 913 (*Wilson*) is best applied to the circumstances of this case. In *Wilson*, the trial court terminated the wife's spousal support on a future date despite the fact the husband had the ability to continue supporting the wife, and the wife could not support herself because a brain injury she suffered during the marriage rendered her permanently disabled. (*Id.* at p. 916.) In addition to the wife's need and the husband's ability to pay, the court considered the marriage's length (5 years, 10 months), that the couple married in their 40's after establishing their own lives, the wife's unemployment during the marriage did not affect her earning capacity, the wife did not contribute to the husband's career, and the husband paid support for 4 years, 10 months. After considering all these circumstances and "balanc[ing] the equities" the court decided "the obligation to assist [the wife] should shift from [the husband] to society." (*Id.* at pp. 917-918.)

In *Wilson*, this Court affirmed, holding that the wife's inability to support herself was just one of the statutory factors section 4320 required the trial court to weigh in making its decision. (*Wilson, supra*, 201 Cal.App.3d at pp. 919-920.) As the *Wilson* court explained, "[o]nce the trial court logically and reasonably applies section [4320], all that remains for the appellate court is a review for potential abuse of discretion. Because [the record showed] the trial court carefully weighed all [the statutory] factors, the decision to terminate support including medical coverage was not an abuse of discretion given the totality of circumstances." (*Id.* at p. 920.)

In the present case, the record establishes that the family court carefully weighed all of the section 4320 factors in making its order terminating spousal support. The trial

court recognized that Kerri was disabled and not able to work. The court found, however, that she had significant assets and should employ a professional fiduciary to assist her in managing those assets according to her own actuarial timeline. The court concluded that Kerri had mismanaged her assets, did not provide adequate explanation for her medical expenses, and her expenses did not reflect her reasonable needs. Further, the court found that the earning capacity of both parties was not sufficient to maintain the standard of living established during the marriage. The court also considered the length of the parties' marriage, that MARCOA was formed before the marriage, Kerri did not contribute to MARCOA, Michael's age and health, the parties' obligations and assets, and balance of equities.

Kerri's disability and ability to become self-sufficient were not the only factors the family court was required to consider. As we explained, the family court's findings on whether there had been a change in circumstances and the section 4320 factors were supported by substantial evidence. Further, they do not amount to an abuse of discretion.

DISPOSITION

The order is affirmed. Michael is awarded his costs on appeal.

PRAGER, J.\*

WE CONCUR:

McCONNELL, P. J.

IRION, J.

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\* Judge of the San Diego Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.